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POLYGRAPH EXAMINATIONS

In *United States v. Ridling*, 350 F. Supp. 90 (E.D. Mich. 1972), and *People v. Cutler*, 12 BNA CRIM. L. REP. 2133 (Los Angeles County Ct. Nov. 6, 1972), trial courts admitted the results of polygraph examinations into evidence in criminal cases.[1]

In *Ridling*, the defendant was indicted for committing perjury before a grand jury. At trial, the defendant offered the testimony of polygraph experts purportedly demonstrating that he had not perjured himself. The court indicated that it would accept the expert testimony, provided that certain conditions, discussed below, were met.[2]

In *Cutler*, the defendant was charged with illegal possession of marijuana. The defendant moved at a pre-trial hearing to exclude the marijuana on the ground that it was illegally seized. The factual issue at the hearing was whether the defendant had voluntarily submitted to the search, on which point the defendant's testimony and that of the police officer directly conflicted. The defendant offered into evidence the results of a polygraph examination which he had taken purporting to show that he was telling the truth. After hearing testimony on the reliability of the polygraph,[3] the court accepted the proffered evidence, excluding, on the basis of that evidence, the seized marijuana.

In 1923, *Frye v. United States*[4] held polygraph evidence inadmissible, reasoning that the polygraph had not gained sufficient acceptance among physiological and psychological experts. The courts in *Ridling* and *Cutler* determined that polygraph testing had been substantially improved since *Frye* and concluded that, as a result of more advanced equipment and testing techniques, the polygraph has attained general acceptance as an effective instrument for detecting deception. Thus, each court decided that it was no longer controlled by *Frye*.[5]

Both courts also faced the issue of whether the proffered evidence should be excluded on the ground that the jury might consider the polygraph examiner's opinion conclusive on the issue of guilt or innocence, thus intruding on the jury's fact-finding role.[6] In *Ridling*, the trial judge conceded that in a perjury case the polygraph evidence might well prove conclusive. The court, however, reasoned that the evidence was so highly probative that its use would benefit both the defendant and society. The court analogized polygraph evidence to other admissible scientific evidence, such as blood and breathalizer tests in intoxification cases and radar data in speeding cases. In such cases, the court noted, the scientific evidence virtually decides the factual issue, but is admitted because of its high probative value and objectivity.

In *Ridling*, the court established a stringent set of standards governing the admissibility of polygraph evidence in order to lessen the possibility that a jury might give too much weight to such data and to prevent fraud or mistake by the polygraph examiner. Since there are only minimum standards for polygraph operators, the court thought it might be difficult to adequately determine the reliability of the defendant's evidence. Therefore, the court decided to appoint its own expert witness to test the defendant. The court ruled that if the defendant refused to be tested by the court's expert, his polygraph evidence would not be admitted. Furthermore, the court ordered that if the court-appointed examiner was unable to determine whether the defendant was telling the truth,[7] none of the polygraph evidence would be

[1] In another recent case, United States v. Zeiger, 350 F. Supp. 685 (D.D.C. 1972), a trial judg admitted a defendant's proffered polygraph evidence. This ruling, however, was reversed on expedited appeal, per curiam and without opinion. __F.2d__ (D.C. Cir. 1972).

[2] The trial judge in *Ridling* noted that a perjury case is ideally suited for admitting polygraph evidence. Perjury is based on wilfully or knowingly giving false evidence, which is exactly what the polygraph examination is designed to test.

[3] Experts testifying on the theory and uses of polygraph data indicated that polygraph tests are more than 90% accurate.

[4] 293 F. 1013 (D.C. Cir. 1923).

[5] These holdings do not conflict with *Frye*, but rather meet the test *Frye* established for admitting expert scientific testimony.

[6] *See* People v. Davis, 343 Mich. 348, 72 N.W.2d 269 (1955), and People v. Leone, 25 N.Y.2d 511, 255 N.E.2d 696 (1969), where polygraph data was rejected on the ground that it intruded on the fact-finding role of the jury.

[7] In 6% of properly administered polygraph examinations, the examiner is unable to determine if the subject is telling the truth. The court thought that if its expert felt the defendant was in this group so much doubt would be cast on the defendant's evidence that it should be excluded.

admitted. However, if these conditions were met, the testimony of both the defendant's experts and the court's experts would be admitted, even though conflicting.

In *Cutler*, the court did not establish such rigorous conditions for the admissibility of polygraph evidence, perhaps because the evidence was not heard by a jury. *Cutler*, however, cited *Ridling* for the proposition that courts have sufficient authority to control, limit, or condition the introduction of polygraph evidence in order not to prejudice the trial process. It is possible, therefore, that the *Cutler* court might institute controls similar to those in *Ridling* if a jury were to hear the polygraph evidence.

Because the *Ridling* court conditioned admission of defendant's polygraph evidence on his submitting to tests by a court-appointed expert, it examined the relationship between polygraph tests and the privilege against self-incrimination. The privilege issue could arise either if the court-appointed expert testified in rebuttal to the defendant's expert or if polygraph testimony was offered independently by the prosecutor. The court pointed out three reasons why the privilege would not ordinarily bar polygraph evidence. First, the privilege can be waived. If proper *Miranda* warnings are given, the court felt that the taking of the test would constitute a waiver. Second, the privilege may not be involved at all. The court compared taking a polygraph test to such nontestimonial evidence as participating in a lineup, fingerprinting or giving blood to determine alcohol content.[8] The court, of course, conceded that the defendant's responses to the examiner's questions would be testimonial evidence which would be excluded if *Miranda* warnings were not given. However, the court stated that if the statements made during the polygraph test are admissible under *Miranda*, the privilege is not violated by eliciting physiological nontestimonial evidence at the same time. Third, the very nature of the polygraph examination protects against violation of the privilege against self-incrimination. For a polygraph test to be scientifically valid, the defendant must voluntarily cooperate with the examiner. Thus, if the defendant is coerced in any manner to participate in a polygraph test, the results of that test would be inadmissible since they would be scientifically invalid.

The *Ridling* court also held that polygraph evidence does not violate the hearsay rule. The hearsay problem arises because the polygraph examiner must, to make his testimony relevant, report out-of-court statements of the defendant. The court contended, however, that the evidence is admissible because the questions of the examiner and the answers of the defendant are not received into evidence to prove the truth of the matter asserted. On the contrary, the answers have probative value only as evidence of the physiological response of the defendant as interpreted by the expert witness. Thus, the testimony admitted is merely the opinion of the expert on what he observes concerning the defendant's physiological responses and what he concludes regarding the truthfulness of the defendant. In any event, the court would admit polygraph tests as an exception to the hearsay rule because of their proven trustworthiness.[9]

Both the *Ridling* and *Cutler* courts recognized that admitting polygraph evidence will have a profound effect on the criminal justice system. The *Ridling* court thought it likely that far fewer cases would reach the trial stage if the polygraph is used by the prosecution and the defense. Many cases will be dismissed if the defendant is cleared by a polygraph examination while the likelihood of guilty pleas will be increased if he is not. As the *Cutler* court pointed out, the great majority of criminal trials turn on the credibility of witnesses and to the extent that the polygraph aids courts in measuring credibility, the criminal justice system will be both more efficient and more just for defendants and society.

Lineups and Right to Counsel

Last Term the United States Supreme Court held in *Kirby v. Illinois*[10] that the sixth amendment right to counsel does not attach at lineups until adversary judicial criminal proceedings against the defendant have commenced. State courts have given effect to this ruling in various ways.

In *Commonwealth v. Lopes*, ___Mass.___, 287 N.E.2d 118 (1972), the lineup in question took place after the defendant's arrest but before he

[8] Gilbert v. California, 388 U.S. 263 (1967), and Schmerber v. California, 384 U.S. 757 (1966), held that handwriting exemplars and blood tests, respectively, are nontestimonial and therefore not protected by the fifth amendment privilege.

[9] *See* Fed. R. Ev. 803(24) (1971 Revised Draft), which states that inherently trustworthy evidence is admissible even if it would normally be inadmissible as hearsay.

[10] 406 U.S. 682 (1972).

had been indicted or otherwise formally charged with any criminal offense. Although the trial judge found that the defendant waived his right to counsel at the lineup, the Massachusetts court found it unnecessary to rule on the waiver issue, reasoning, under *Kirby*, that the right to counsel had not attached. *Lopes* reversed the pre-*Kirby* rule in Massachusetts that a pre-indictment lineup is a critical stage in a criminal prosecution and therefore the right to counsel attaches when the defendant participates in such an identification.[11] The earlier Massachusetts rule was based on an expansive reading of *United States v. Wade*[12] and *Gilbert v. California*,[13] which held that an in-court identification of the defendant is inadmissible in evidence if its source was a lineup at which the defendant's right to counsel had been denied.

These cases have been thought to establish a per se rule excluding identification since no direct showing of unfairness at the lineup is required. *Lopes* limits application of a per se exclusionary rule to post-indictment lineups.

Chandler v. State, 501 P.2d 512 (Okla. Crim. App. 1972), also involved a post-arrest, pre-arraignment lineup. Prior to *Kirby* the Oklahoma rule was that the right to counsel attached at pre-indictment lineups.[14] Although the court in *Chandler* realized that after *Kirby* there is no constitutional right to counsel at pre-indictment or pre-information lineups, it nevertheless required that before any lineup is conducted the suspect be given the right to contact an attorney or be informed that one will be called if he is unable to hire one. The court felt that counsel was necessary to prevent lineups which are unnecessarily suggestive.[15] To this extent the Oklahoma court read *Kirby* narrowly, and reiterated that, for a lawful lineup, counsel must be present or the right to counsel affirmatively waived.

A third case interpretating *Kirby* is *Arnold v. State*, 484 S.W.2d 248 (Mo. 1972). The questioned lineup occurred after a complaint charging the defendant had been filed and a warrant issued for his arrest, but before an indictment or information had been filed.

Nevertheless, the court ruled that filing a complaint and issuing a warrant initiate "adversary criminal proceedings" within the meaning of *Kirby*, so that the right to counsel attaches at that point.

Although *Arnold* ostensibly relies directly on the Court's opinion in *Kirby*, the result conforms more closely to the dissenting opinion of Justice Marshall. Justice Marshall contended that counsel for lineups attaches at arrest, since possible abuses involved in identification procedures are the same whether the lineup occurs before or after indictment. The *Arnold* court's definition of adversary judicial proceedings seemingly adopts Marshall's view, since practically nothing more than arrest had occurred in the case.

[11] *See, e.g.*, Commonwealth v. Guillory, 356 Mass. 591, 254 N.E.2d 427 (1970).

[12] 388 U.S. 218 (1968).

[13] 388 U.S. 263 (1968).

[14] State v. Thompson, 438 P.2d 287 (Okla. Crim. App. 1968).

[15] The court cited Stovall v. Denno, 388 U.S. 293 (1967), which held that due process prohibits suggestive lineups.